In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-547

KAWASAKI MOTORS CORPORATION, PETITIONER

v.

RUSSELL E. TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, AND THE ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the United States Court of Appeals for the Ninth Circuit erred in dismissing its petition for review as untimely.

On November 12, 1973, the Environmental Protection Agency promulgated the motorcycle regulation contained in its California Transportation Control Plan.[1] Under Section 307(b)(1) of the Clean Air Act, 84 Stat. 1708 (42 U.S.C. 1857h-5(b)(1)), petitions for review of such a regula-

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[1]The regulation appears at 40 C.F.R. 52.243, 38 Fed. Reg. 31245-31246, and by its terms bans motorcycle operation in specific areas of the State of California at specific times of the day. The ban is to go into effect January 1, 1976, but may be suspended if the Environmental Protection Agency establishes certain national emission standards on 1976 and later model year motorcycles.

tion are to be filed within 30 days of promulgation unless they are "based solely on grounds arising after such 30th day."[2] Petitioner did not file its petition for review until April 19, 1974, some 158 days after promulgation of the regulation. Respondents moved to dismiss the petition (Pet. App. C, A4-A7), and petitioners filed an opposition to dismissal, urging the existence of grounds arising after the 30-day limitation, and attaching affidavits to that effect (Pet. App. D, A8-A25). Before respondents had filed a reply memorandum, the court of appeals, on August 9, 1974, granted respondents' motion to dismiss (Pet. App. E, A26).

1. The dismissal was correct. Section 307(b)(1) of the Clean Air Act confers jurisdiction upon courts of appeals to review implementation plans only upon petitions for review filed within 30 days from the date of promulgation of the plan, unless review is sought solely on grounds arising later. Accordingly, the courts of appeals have consistently denied untimely petitions for review (Pet. App. C, A5-A6).

Petitioner sought to avoid the requirement of the statute by invoking the final clause in Section 307(b)(1), asserting that the "sole" basis for its petition for review arose more than 30 days after the California Plan was promulgated. But petitioner's affidavits show only that sometime after promulgation of this regulation it conducted tests indicating that it might not be able to achieve

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[2]Section 307(b)(1) of the Clean Air Act provides in pertinent part:

> A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

emissions reductions sufficient to satisfy a regulation lifting the ban on motorcycles (in some areas of California during specified daylight hours). The petition, which questioned the California ban as a whole (Pet. App. A, A1), was not based "solely" on grounds arising after the statutory 30 days[3] for contesting such a regulation, and the court of appeals properly rejected it.

2. Contrary to petitioner's assertion (Pet. 4), dismissal of its petition for review did not leave the motorcycle regulation unchallenged. Other parties made timely challenges to the regulation.[4] Moreover, petitioner is free to participate in the rulemaking for national standards for motorcycle emissions which, if sufficiently strict, will lift the California ban, perhaps before it goes into effect.[5]

The decision is correct; it conflicts with no decision of this or any other court, and it presents no reason for review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[3]The "grounds" petitioner relied upon existed, if at all, before promulgation of the regulation. To hold that results of belatedly conducted tests are "grounds arising after" the 30-day period is to make the time limit meaningless. Such a ruling would eliminate any incentive to conduct tests promptly, as Section 307(b)(1) contemplates.

[4]The parties are the State of California (No. 73-3305), the City of San Jose (No. 73-3263) and the California Business Properties Association (No. 73-3250). The numbers in parentheses refer to the petitions filed in the Court of Appeals for the Ninth Circuit.

[5]A notice of proposed rulemaking for new motorcycle emission standards was published on January 17, 1974, in 39 Fed. Reg. 2108.